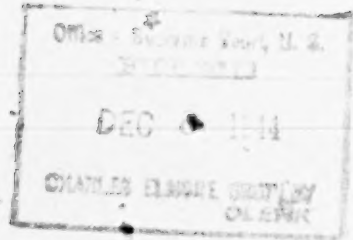


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No. 207

In the Supreme Court of the United States.

OCTOBER TERM, 1944

LENA ROSENMAN AND THE NATIONAL CITY BANK
OF NEW YORK, A CORPORATION, AS EXECUTORS OF
THE LAST WILL AND TESTAMENT OF LOUIS ROSEN-
MAN, DECEASED, PETITIONERS

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES



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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 13-18)
is reported in 53 F. Supp. 722.

JURISDICTION

The judgment of the Court of Claims was entered on April 3, 1944 (R. 18-19). The petition for a writ of certiorari was filed on June 29, 1944 (R. 19), and was granted on October 9, 1944 (R. 19).

The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

The executors of an estate, having received an extension of time within which to file the estate tax return, made a payment of estimated tax due in December 1934, which was deposited as an internal revenue collection by the Collector in a "suspense account" to the credit of the Treasurer of the United States. In 1935, part of the payment was credited against the tax assessed on the basis of the return, and in 1938, the balance was credited against a deficiency assessment. The question is whether a claim for refund filed more than three years from the date of the actual payment in 1934, but within three years from the time the Collector applied the remainder against the deficiency assessment in 1938, is within time to permit recovery of any part of the latter amount under Section 319 (b) of the Revenue Act of 1926, as amended by the Revenue Act of 1932.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 304. (a) The executor, within two months after the decedent's death, or within a like period after qualifying as such, shall give written notice thereof to the collector. The executor shall also, at such times and in

such manner as may be required by regulations made pursuant to law, file with the collector a return under oath in duplicate, setting forth (1) the value of the gross estate of the decedent at the time of his death, or, in case of a nonresident, of that part of his gross estate situated in the United States; (2) the deductions allowed under section 303; (3) the value of the net estate of the decedent as defined in section 303; and (4) the tax paid or payable thereon; or such part of such information as may at the time be ascertainable and such supplemental data as may be necessary to establish the correct tax.

* * * * *

SEC. 305. (a) The tax imposed by this title shall be due and payable one year after the decedent's death, and shall be paid by the executor to the collector.

(b) Where the Commissioner finds that the payment on the due date of any part of the amount determined by the executor as the tax would impose undue hardship upon the estate, the Commissioner may extend the time for payment of any such part not to exceed five years from the due date. In such case the amount in respect of which the extension is granted shall be paid on or before the date of the expiration of the period of the extension.

(c) If the time for the payment is thus extended there shall be collected, as a part of such amount, interest thereon at the

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rate of 6 per centum per annum from the expiration of six months after the due date of the tax to the expiration of the period of the extension.

* * * *

SEC. 306. As soon as practicable after the return is filed the Commissioner shall examine it and shall determine the correct amount of the tax.

SEC. 319 [As amended by the Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 810]. * * *

(b) All claims for the refunding of the tax imposed by this title alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax. The amount of the refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of the refund.

* * * *

Treasury Regulations 80 (1934 ed):

ART. 63. *When return required—Date of filing.*—* * * In the case of a resident, the return must be filed with the collector in whose district the decedent had his domicile at the time of death. * * * It must be filed in duplicate within one year after the date of death, or, in any particular instance, at such time prior to the expira-

tion of such year as the Commissioner may designate. If the due date for filing the return falls on a Sunday or on a legal holiday, the due date for filing will be the day following such Sunday or legal holiday.

* * * *

ART. 64. *Persons liable for return.*—* * * If, in any case, the executor is unable to make a complete return as to any part of the gross estate, he is required to give all the information he has as to such property, including a full description, and the name of every person holding a legal or beneficial interest in the property. * * *

* * * *

ART. 69. *Extension of time by Commissioner.*—If it is impossible for the executor to file a reasonably complete return within one year from the date of death, the Commissioner may, upon application from the executor showing good and sufficient cause, grant an extension of time not to exceed six months from the due date. Before the expiration of the extension period granted a return as complete as possible must be filed. The return thus filed will be the return required by section 304 (a) and any tax shown thereon will be the "amount determined by the executor as the tax" referred to in section 305 (b) and section 307. Such return cannot thereafter be amended although supplemental information may subsequently be filed that may result in a

finally determined tax different from the amount shown as the tax by the executor upon his return. An extension of time for filing the return does not operate to extend the time for the payment of the tax, which is due one year after the decedent's death. An extension of time in which to make payment of the tax may be secured as provided in article 82.

STATEMENT

The special findings of fact of the Court of Claims (R. 6-13), insofar as material to the issue involved herein, may be summarized as follows:

On December 11, 1934, petitioners, as executors under the will of Louis Rosenman, who died on December 25, 1933, requested an extension of time within which to file the federal estate tax return for the estate (R. 6).

On December 15, 1934, the time to file the estate tax return was extended by the Commissioner of Internal Revenue to February 25, 1935 (R. 6-7). In the letter granting the extension, the Commissioner advised petitioners that the extension of time within which to file the return did not operate to extend the time for payment, and further stated (R. 7):

It is suggested that the tax be estimated and paid to avoid delinquency in payment.

¹ Since the decedent died on December 25, 1933, the estate tax was due and payable under Section 305 (a) of the Revenue Act of 1926 on December 25, 1934.

the consequent liability for penalty and the accumulation of interest at the rate of one per centum per month from the due date until paid.

On December 24, 1934, petitioners delivered to the Collector a check for \$120,000 accompanied by a letter of transmittal in which it was stated, *inter alia* (*ibid.*):

We are delivering to you herewith, by messenger, an Estate check payable to your order, for \$120,000, as a payment on account of the Federal Estate tax.

On December 26, 1934, the Collector placed the sum of \$120,000 to the credit of the estate in Account 9. Account 9 is a suspense account in the books of the Collector of Internal Revenue for the First District of New York to which monies received in connection with federal estate taxes, and other miscellaneous taxes, are deposited if, as here, no assessment against the person making such payment is outstanding at the time such monies are received. All payments placed in Account 9 are deposited as internal revenue collections to the credit of the Treasurer of the United States in the same manner as collections which are applied immediately to some account on the assessment list. (R. 7-8.)

On February 25, 1935, petitioners filed an estate tax return showing a tax due of \$80,224.24. After the return was filed, the tax was assessed and on March 22, 1935, the amount of \$120,000

was classified and \$80,224.24 thereof was credited against the assessment of the latter amount. The balance of the \$120,000 (\$39,775.76) remained in Account 9 to the credit of the estate until April 1938. (R. 8.)

On March 28, 1935, the Collector forwarded to petitioners a notice and demand for estate tax which showed that the \$120,000 paid in December 1934 had been credited to Account 9 and that \$80,224.24 thereof had been applied in satisfaction of the tax assessed. On March 26, 1938, petitioners filed with the Collector a claim for the refund of \$39,775.76 on the ground that the notice and demand forwarded to them by the Collector showed that that amount was due and owing to the petitioners. (R. 8.)

Subsequently, an audit by the Commissioner of the federal estate tax return showed a total net tax of \$128,759.08. After taking into account the amount shown due on the return, an estate tax deficiency of \$48,534.84 was determined and notice thereof was mailed to the petitioners. No appeal having been taken by the petitioners to the Board of Tax Appeals, the deficiency of \$48,534.84 was assessed in April 1938. In the same month the Collector applied the balance of \$39,775.76 standing to the credit of petitioners in Account 9 in partial satisfaction of the deficiency of \$48,534.84 and demanded payment of the bal-

ance of the assessment (\$8,759.08), together with interest thereon (\$1,738.26). (R. 8-9.)

On April 22, 1938, petitioners paid to the Collector the total amount so demanded of \$10,497.34. (R. 9.)

On May 26, 1938, the Commissioner rejected the claim for refund filed on March 26, 1938, upon the ground that, since a deficiency had been assessed, there was⁸ accordingly no overpayment. (R. 9.)

On May 20, 1940, petitioners filed with the Collector a claim for refund of \$24,717.12, upon the ground that in computing the net estate additional deductions should be allowed for executors' commissions, attorneys' fees, miscellaneous administration expenses and an additional amount paid in settlement of the claims. On May 22, 1940, the Commissioner rejected this claim on the ground that no evidence had been submitted in support of the deductions claimed and that the tax in excess of \$10,497.34 had been paid more than three years prior to the filing of the claim. (R. 9.)

Upon the foregoing facts, the Court of Claims held that petitioners were entitled to certain of the deductions claimed (R. 18), but that any resulting refund in excess of the amount of \$10,497.34, the amount paid on April 22, 1938, was barred by the statute of limitations (R. 16). Judgment was accordingly rendered for petitioners for \$10,497.34, with interest (R. 18-19).

SUMMARY OF ARGUMENT

Section 319 (b) of the Revenue Act of 1926, as amended, requires that a claim for refund of estate taxes be filed within three years next after the payment of the tax and limits recovery to the amount paid within such period. The limitations are based solely on the time of payment and are not concerned with the grounds of the assessment. When considered with the provisions of other Sections of the statute dealing with the date when the tax is due and the requirements for filing returns, the statute would seem to mean that the date when the tax due and owing is paid to the Collector starts the running of the statute. In the instant case this date was December 24, 1934, when the check for the estimated tax due was delivered to the Collector.

It is immaterial that the estate tax return when filed showed a lesser amount due and that the difference between the amount paid and that shown due on the return was retained by the Collector and later credited against a deficiency in tax determined to be due.

The acts of the parties show their intention that the December 1934 delivery of the check for the estimated tax due was a "payment" of the tax. The decisions of other courts involving the question of what constitutes an "overpayment" under the provisions allowing interest on overpayments are in conflict and those which hold that the excess of the payment made in advance of filing the return over

the tax finally determined to be due was not an overpayment turned in part on the rule of construction that the sovereign is not liable for interest in the absence of clear statutory authority. In any event, in view of the amendment to Section 3770 of the Internal Revenue Code made by the Current Tax Payment Act of 1943, the interest question has been solved in a manner consistent with the decision in this case since the payment here was made in accordance with requirements of the statute. Orderly administration of the revenue laws requires that taxpayers should be able to ascertain the limitations on filing claims for refund. The provision that the statutory period starts to run when payment is originally made to the Collector, whether by check or cash, is a reasonable one.

ARGUMENT

SINCE NO PAYMENT OF THE TAX IN EXCESS OF \$10,497.34 WAS MADE WITHIN THREE YEARS OF THE FILING OF THE CLAIM ON WHICH THIS SUIT IS BASED, SECTION 319 (B) OF THE REVENUE ACT OF 1926, AS AMENDED, BARS RECOVERY OF ANY GREATER AMOUNT

The filing of a timely claim for refund is a prerequisite to a suit for the recovery of taxes. *Rock Island &c. R. R. v. United States*, 254 U. S. 141; *United States v. Garbutt Oil Co.*, 302 U. S. 528. Section 319 (b) of the Revenue Act of 1926, as amended (*supra*, p. 4) requires that all claims for the refunding of estate tax shall be filed

"within three years next after the payment of such tax." It further provides that the amount of the refund "shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim." Two claims for refund were filed in this case, one on March 26, 1938, and one on May 20, 1940, but taxpayer relies solely upon the claim for refund filed on May 20, 1940, and must necessarily do so, since the earlier claim filed on March 26, 1938, did not raise the issues raised in this proceeding and cannot form the basis of any recovery.² *Real Estate Title Co. v. United States*, 309 U. S. 13; *United States v. Felt & Tarrant Co.*, 283 U. S. 269.

² This suit is based on the contention that the Commissioner erred in disallowing certain deductions in determining the deficiency asserted (R. 4). The claim for refund filed on March 26, 1938, was based on the ground that the amount paid in advance of filing the return exceeded the tax disclosed by the return (R. 8). Consequently, even if the March 1938 claim were timely, it would not support a recovery of any amount in this suit. This is true even if it could be regarded as a general claim subject to amendment, though we think it could not. *United States v. Andrews*, 302 U. S. 517; *Rogan v. Taylor*, 136 F. 2d 598 (C. C. A. 9th). Since the March 1938 claim had been rejected on May 26, 1938 (R. 9), prior to the filing of the claim of May 20, 1940, the latter claim could not be regarded as amending the preceding one. *United States v. Memphis Cotton Oil Co.*, 288 U. S. 62; *American Bosch Magneto Corp. v. United States*, 6 F. Supp. 455 (C. Cls.); *Solomon v. United States*, 57 F. 2d 150 (C. C. A. 2d); *Dysart v. United States*, 95 F. 2d 652 (C. C. A. 8th), certiorari denied, 305 U. S. 608.

On the basis of the claim filed on May 20, 1940, the court below allowed recovery of \$10,497.34, the amount of tax paid on April 22, 1938. It limited recovery to that amount on the ground that it was the only portion of the tax paid within three years of the filing of the claim, the remainder of the tax having been paid on December 24, 1934, when the check for \$120,000 was delivered to the Collector.

1. If the court below was correct in holding that no more than \$10,497.34 was paid within three years of May 20, 1940, the allowance of any greater refund would seem to be precluded by the plain language of Section 319 (b), and the petitioners did not contend otherwise in the court below. Their contention there was that \$39,775.76 of the tax was not paid until April 1938, the advance payment of \$120,000 being merely a deposit, and hence that they were entitled to recover the full sum for which this suit was brought.³ While the deposit argument is renewed here (Br. 12-16), the petitioners now deny that the case necessarily turns on the time of payment and assert that the phrase "within three years next after the payment

³ The suit was brought for the recovery of \$24,717.12 (R. 5). It will be noted that the Court of Claims has not determined the exact amount of the overpayment by petitioners, but has decided only that recovery should be limited to \$10,497.34 paid on April 22, 1938 (R. 18-19). If, therefore, this Court should reverse the judgment of the Court of Claims, the case would have to be remanded for further proceedings.

of such tax" in the first sentence of Section 319 (b), as amended, and "the portion of the tax paid during the three years immediately preceding the filing of the claim" in the second sentence refer to payment of the tax with respect to which the cause of action arises. The contention (Br. 7-12) apparently is that the cause of action with respect to \$39,775.76 arose in April 1938, when that amount was applied against the deficiency, since at no earlier time had the Commissioner or the Collector done any wrongful act.

The petitioners cite no decisions in support of this novel construction of the statute and we know of none. General provisions basing the period of limitations for filing refund claims of internal revenue taxes on a specified number of years after payment of the tax have been in effect since the amendment of Section 3228 of the Revised Statutes by Section 1316 of the Revenue Act of 1921, c. 136, 42 Stat. 227. See *Ordway v. United States*, 37 F. 2d 19 (C. C. A. 2d). A separate provision thus limiting the time for filing claims for income tax and estate tax refunds first appeared respectively in Section 281 (b) (1) of the Revenue Act of 1924, c. 234, 43 Stat. 253,⁴ and Section 319 (b) of the

⁴ See, however, Section 252 of the Revenue Act of 1918, c. 18, 40 Stat. 1657, which provided that claims for refund of income taxes might be filed within five years after the return was due, and compare Section 252 of the Revenue Act of 1921, c. 136, 42 Stat. 227.

Revenue Act of 1926, c. 27, 44 Stat. 9. Section 281 (b) (2) also limited the amount of the recovery to the amount of tax paid within the specified period, but it was not until 1932 that Section 319 (b) was amended by Section 810 of the Revenue Act of 1932, c. 209, 47 Stat. 169, to impose a similar limitation as to estate taxes and Section 3228 of the Revised Statutes was amended by Section 1106 to impose a like limitation as to other internal revenue taxes.

Under the earlier statutes which did not limit the amount of recovery to the amount paid within the specified period, as, for example, under Section 3228 of the Revised Statutes as it stood prior to the enactment of Section 1106 of the Revenue Act of 1932, or under Section 319 (b) of the Revenue Act of 1926 prior to the enactment of Section 810 of the Revenue Act of 1932, it was held in many cases not only that the time ran from the last payment but that if the claim was filed within the specified period, recovery could be had of an amount in excess of the sum paid within such period. *Union Trust Co. v. United States*, 70 F. 2d 629 (C. C. A. 2d), certiorari denied, 293 U. S. 564; *United States v. Magoon*, 77 F. 2d 804 (C. C. A. 9th); *United States v. Clarke*, 69 F. 2d 748 (C. C. A. 3d), certiorari denied, 293 U. S. 564; *Tait v. Safe Deposit & Trust Co. of Baltimore*, 78 F. 2d 534 (C. C. A. 4th); *Hills v. United States*, 50 F. 2d 302, 55 F. 2d 1001, 8 F. Supp. 849 (C. Cls.), all of which cases involved estate

taxes. In several of these cases, recovery was allowed on the basis of errors made on the return, though the only tax paid within the prescribed period was an additional tax. *United States v. Clarke*, 69 F. 2d 748 (C. C. A. 3d), certiorari denied, 293 U. S. 564; *Hills v. United States*, 50 F. 2d 302, 55 F. 2d 1001, 8 F. Supp. 849 (C. Cls.). This failure to limit the amount of recovery of estate taxes was, as stated, cured by the 1932 amendment.² See *Rogan v. Taylor*, 136 F. 2d 598 (C. C. A. 9th).

Many cases involving other taxes have held or assumed, without argument, that time of payment of the tax alone determines the limit for filing

² It was probably the first decision (50 F. 2d 302) in the *Hills* case, which led to the 1932 amendments made to Section 3228 of the Revised Statutes and Section 319 (b) of the Revenue Act of 1926. The purpose, as disclosed by legislative history, was to prohibit expressly refund of any portion of the tax not paid within the specified period. See H. Rep. No. 708, 72nd Cong., 1st Sess., p. 50 (1939-1 Cum. Bull. (Part 2) 457); S. Rep. No. 665, 72nd Cong., 1st Sess., pp. 53, 58 (1939-1 Cum. Bull. (Part 2) 496) and Statement of Managers of the House, H. Conference Rep. No. 1492, 72nd Cong., 1st Sess., p. 29 (1939-1 Cum. Bull. (Part 2) 539). See also *Brewer v. National Life & Acc. Ins. Co.*, 119 F. 2d 313 (C. C. A. 6th), certiorari denied, 314 U. S. 624, which criticizes the *Hills* case. The *National Life* case, however, involved the time limit for the institution of suits under Section 1113 (a) of the Revenue Act of 1923, reenacting Section 3226 of the Revised Statutes. The time for instituting a suit for recovery of any tax under that statute is five years from the date of payment of such tax unless suit is instituted within two years after rejection of the claim. See *United States v. A. S. Krider Co.*, 313 U. S. 443.

claims and the amount of recovery allowable under provisions similar to Section 319 (b), as amended, governing claims for refund of such taxes. *United States v. Garbutt Oil Co.*, 302 U. S. 528; *United States v. Andrews*, 302 U. S. 517; *United States v. Chicago Golf Club*, 84 F. 2d 914 (C. C. A. 7th); *San Joaquin Light & Power Corp. v. McLaughlin*, 65 F. 2d 677 (C. C. A. 9th); *Sugar Land Ry. Co. v. United States*, 48 F. 2d 973 (C. Cls.); *Mohawk Rubber Co. v. United States*, 25 F. Supp. 228 (C. Cls.), certiorari denied, 307 U. S. 645. The decisions, therefore, are in general opposed to any theory that the limitation on the time for filing the claim depends on when the particular assessment involving the error was paid. Furthermore, the Commissioner ruled at an early date that under Section 281 (b) (2) of the Revenue Act of 1924, a claim for refund filed within four years after payment of tax was timely and permitted recovery of the amount of tax paid within the four-year period irrespective of the basis on which the assessment of the tax during the specified period was made. S. M. 3380, IV-1 Cum. Bull. 80 (1925).

The petitioners' construction of Section 319 (b) rests chiefly on the contention that it was derived from Section 3228 of the Revised Statutes, as amended by Section 1316 of the Revenue Act of 1921; that prior to the amendment in question, Section 3228 required claims to be filed within a

specified number of years "next after the cause of action accrued"; and that no change was intended when the phrase "next after the payment of such tax" was substituted. See *Ordway v. United States*, 37 F. 2d 19 (C. C. A. 2d). The argument is (Br. 7-8) that when the amendment was made in 1921, it was settled law that a tax could not be recovered back in a lawsuit even though erroneously or illegally collected unless paid under protest or duress; that necessarily such payment fixed the time of accrual of the cause of action (*Savings Institution v. Blair*, 116 U. S. 200, 204; *Public Service Corp. of New Jersey v. Herold*, 279 Fed. 352, 354 (C. C. A. 3d)); and hence, in substituting the new phrase, Congress was not changing the law but was merely clarifying it by specifying the particular event which under the law as it then stood fixed the time of accrual of the cause of action.

It may be true, as the petitioners urge, that the amendment of Section 3228 of the Revised Statutes by Section 1316 of the Revenue Act of 1921 did not accomplish any change in existing law with regard to claims that would support a suit to recover taxes, except to extend the time to file a claim for two years after the tax was paid to four years. See S. Rep. No. 275, 67th Cong., 1st Sess., p. 32 (1939-1 Cum. Bull. (Part 2) 181). But if so, this was probably not for the reason that the language of the amendment had no different meaning but because, as a

condition precedent to recovery by suit, existing law required payment of the tax under protest, a requirement that was removed by Section 1014 of the Revenue Act of 1924, amending Section 3226, of the Revised Statutes. Before this amendment the Commissioner could voluntarily refund taxes paid without protest (see *Chesebrough v. United States*, 192 U. S. 253; see also *Fox v. Edwards*, 287 F. 2d 669 (C. C. A. 2d)); but so long as the particular payment sought to be recovered by suit had to be paid under protest, the taxpayer could not recover a tax voluntarily paid on the basis of his return, even if the claim was filed within the specified period of time.⁶ The amendment of Section 3226 by the 1924 Act, however, remedied a situation which had been regarded as extremely unfair to taxpayers (S. Rep. No. 398, 68th Cong., 1st Sess., pp. 44-45 (1939-1 Cum. Bull. (Part 2) 266)), and it will be noted that it was construed as being applicable where suit was brought after the enactment of the statute, even though taxes were paid prior thereto. *Moore Ice Cream Co. v. Rose*, 289 U. S. 373.

Inasmuch as payment under protest is no longer required even for recovery by suit, there is no basis for holding that the term "payment of such tax" as used in Section 319 (b) means a payment that in-

⁶ *Winant v. Gardner*, 29 F. 2d 836 (C. C. A. 2d); *Harrison v. Lewellyn*, 28 F. 2d 990 (W. D. Pa.), affirmed on other grounds, 35 F. 2d 283 (C. C. A. 3d). See also *United States v. Cuba Mail S. S. Co.*, 200 U. S. 468; *Girard Trust Co. v. United States*, 270 U. S. 163.

volved erroneous or illegal action on the part of the administrative officials. Any overpayment, whether made voluntarily by the taxpayer on the original return or as a result of an additional assessment made by the Commissioner, is a tax "erroneously or illegally assessed or collected" and it may be recovered if a claim is filed within the prescribed time after the tax is paid and the amount allowed does not exceed the portion of the tax paid within such period.

In *Blair v. Birkenstock*, 271 U. S. 348, this Court had occasion to consider this phrase "erroneously or illegally assessed or collected" in connection with a claim for interest under Section 1019 of the Revenue Act of 1924.¹ In that case the taxpayer had filed a return making quarterly payments, as she was permitted to do under the Act. She later filed a claim for refund for part of the original tax; this claim was allowed by the Commissioner and the refund was paid with interest. The taxpayer contended that she had received insufficient interest and that as each of the quarterly installments paid was in excess of one quarter of the proper amount of the tax for the year, interest allowed on the refund should have been computed on the excess of each quarterly payment from the date on which

¹ That Section provides that upon the allowance of a credit or refund "of any internal revenue tax erroneously or illegally assessed or collected" interest should be allowed and paid from the date such tax was paid to the date of the allowance of the refund.

it was paid. This Court, however, held that such overpayment became a "tax erroneously or illegally assessed or collected" only when the amount paid added to the previous quarterly payments exceeded the whole tax due for the year. The Court said (271 U. S. at p. 353):

Payments in excess of the total amount of the tax, then and subsequently made, are subject to refund or credit under the provisions of § 1019, and interest must be allowed on them at the rate of 6 per cent., from the date of payment.

In *Hills v. United States*, 8 F. Supp. 849 (C. Cls.), the Court of Claims, in holding that under Section 3228 of the Revised Statutes prior to the amendment made by the 1932 Act (referred to above, p. 15), the estate tax should be treated as a whole and a claim for refund filed within four years from the payment of any part thereof was sufficient to allow recovery of any part of the tax, also had occasion to discuss the meaning of the words "alleged to have been erroneously or illegally assessed or collected." It stated (8 F. Supp. at p. 853):

These words were inserted to carry out the purpose expressed in section 3220 (26 USCA § 149), which gave the Commissioner authority to remit, refund, or pay back all taxes erroneously or illegally assessed or collected, and had for their object the requirement that the taxpayer set forth in his claim the facts and grounds upon which

he relied to entitle him to the refund of the amount claimed. We think it is clear, therefore, that these words cannot be construed to limit the amount which the taxpayer may recover to that portion of the tax collected within the preceding four years. Section 3228, so far as it concerns the question now under consideration, has not been materially changed since its enactment in section 44 of the Act of June 6, 1872, entitled "An Act to reduce Duties on Imports, and to reduce Internal Taxes, and for other Purposes." 17 Stat. 230, 257. A consideration of the conditions existing at the time of its enactment and the decisions which had been rendered with reference to the requirement of a specific protest, as a condition to the right to recover amounts exacted in certain circumstances by agents of the government, and a proper consideration of the words "alleged to have been erroneously or illegally assessed or collected," show that Congress intended to impose upon the taxpayer the obligation of alleging grounds sufficient to show that there had been an erroneous or illegal exaction in respect of the total amount claimed. Compare *Cary v. Curtis*, 3 How. 236, 11 L. Ed. 576; *Curtis's Administratrix v. Fidler*, 2 Black. 461, 17 L. Ed. 273; *Nichols v. United States*, 7 Wall. 122, 19 L. Ed. 125; *Collector v. Hubbard*, 12 Wall. 1, 20 L. Ed. 272; and *Erskine v. Van Arsdale*, 15 Wall.

75, 21 L. Ed. 63. Without the words "alleged to have been erroneously or illegally assessed or collected," the section might have been subject to the construction that a refund claim alleging no grounds to show that the amount claimed was erroneously or illegally exacted would be a sufficient claim under the statute. * * *

Petitioners' contention that the period of limitations does not begin to run until the Collector takes some action in assessing the tax which is erroneous or illegal would, if carried to its logical conclusion, be an exceedingly harsh rule for taxpayers. The ordinary practice, as is well known, is for a taxpayer to file his return and pay the tax due thereon. The tax is not assessed until later and the taxpayer ordinarily does not know when the actual assessment is made. The time of assessment is therefore an unsatisfactory date. Moreover, the petitioners would contend that even if an additional assessment were paid within three years before the filing of a claim, the taxpayer could not recover any of the tax attributable to an error on the original return. Also according to the theory now advanced by petitioners, interest should run not from the date of the overpayment (cf. *Blair v. Birkenstock*, 271 U. S. 348) but from the date of the assessment since it was not until that date that the tax became one "erroneously or illegally assessed or collected."

Such a construction would upset a long established administrative practice.*

In this connection it should be noted that in March 1935, the Commissioner assessed the tax in the amount of \$80,224.24 and the petitioners say (Br. 12) that this action of the Commissioner was neither erroneous nor illegal. However, on their theory, if petitioners were seeking to recover any part of the amount of \$80,224.24, then they would undoubtedly be obliged to allege that the Commissioner acted erroneously or illegally in assessing the amount and hence that the time ran from that date. With regard to the situation in March 1935, petitioners state (Br. 12, fn. 7) that the Government officials would have paid the remaining amount of \$39,775.76 over to them at their request. If so, it would seem that a cause of action accrued at that time and not later when the deficiency was assessed and the claim here would be barred even on the petitioners' own theory. It is true that they attempt to meet this argument by suggesting (Br. 12, fn. 7) that the six-year period of limitation provided by Section 156 of the Judicial Code applies. But this suit was brought for the recovery of internal revenue taxes and it is governed by the express limitations applicable to such suits. *United States v. A. S. Kreider Co.*, 313 U. S. 443.

* Treasury Regulations 65, promulgated under the Revenue Act of 1924, provide that interest runs in the case of a refund from the date the tax, penalty, or sum is paid. Regulations under the later Acts contain similar provisions.

We submit, therefore, that the Court of Claims was correct in holding that this case turns on the time of payment of the tax, just as Section 319 (b) plainly provides.

2. Assuming that both the limitation as to time of filing the claim and the limitation as to the amount of recovery under Section 319 (b), as amended, are based solely on the time of payment of the tax, it will be noted that there are several dates on which the tax of \$120,000 might conceivably be said to have been paid: (1) December 24, 1934, when the check for \$120,000 was actually delivered; (2) February 25, 1935, when the estate tax return was filed; (3) March 22, 1935, when the assessment of \$80,224.24 was made; and (4) April 22, 1938, when the deficiency was assessed and \$39,775 of the \$120,000 payment credited against it. While we take the position that the whole \$120,000 was paid in December 1934, it will be noted that the petitioners could not prevail even if it were held that this payment was made in 1935. Their case depends on holding that the payment was made in 1938.

It is not disputed that the payment of \$120,000 was actually made on December 24, 1934. Moreover, as we subsequently point out, the payment was made at a time when the estate tax was immediately due and payable, though an extension for the filing of the return had been secured. Under those circumstances, we submit that the 1934 payment should be regarded as payment of the tax.

Section 305 (a) of the Revenue Act of 1926, *supra*, p. 3, provides that the estate tax shall be "due and payable" one year after the decedent's death and shall be paid by the executor to the Collector. An extension for payment may be granted by the Commissioner not to exceed five years, but if the time is so extended, interest is collectible from the expiration of six months after the due date to the expiration of the period of extension. Section 305 (b) and (c), *supra*, pp. 3-4.

Section 304 (a) (*supra*, pp. 2-3) requires the executor to notify the Collector of the decedent's death within two months after the date of the decedent's death or within two months after qualifying as executor and to file the return at such time and in such manner as may be required by regulations made pursuant to law. Article 63 of Regulations 80, *supra*, pp. 4-5, requires that the return be filed within one year after the date of death, or in any particular instance at such time prior to the expiration of such year as the Commissioner may designate.

Article 69 of Treasury Regulations 80, *supra*, pp. 5-6, provides that the time for filing the return may be extended but that such an extension does not in and of itself operate to extend the time for the payment of the tax which is due one year after decedent's death. Both Section 304 (a) of the Revenue Act of 1926 and Article 64 of Treasury Regulations 80 (*supra*, pp. 2-3, 5) apparently take cognizance of the fact that the executors may

not be able definitely to ascertain the tax liability when the return is filed. Section 304 (a) provides that the return shall set forth certain information including—

the tax paid or payable thereon; or such part of such information as may at the time be ascertainable and such supplemental data as may be necessary to establish the correct tax.

Article 64 (*supra*, p. 5) requires the executor to give as complete information as he has available. There can be no doubt that in a great many instances the estate tax may not be definitely determined within one year after the decedent's death. However, the fact that the correct tax cannot be definitely determined does not relieve the executors from filing the return and paying the estimated tax within the prescribed period. When, therefore, an amount is paid by the executors to the Collector at a time when, under Section 305 (a) (*supra*, p. 3) a tax is immediately due and payable, it would seem logical that this should be the date of payment of the tax under the limitations Section of the same statute (Section 319 (b), as amended, *supra*, p. 4), even though it should be later determined that the executors should have paid more or less than that amount.

Even if, as contended by petitioners in the court below, there must be an intention on the part of the taxpayer to satisfy and extinguish its tax obligation and the intention of the United

States to accept the payment in satisfaction and extinguishment of the tax,⁹ we submit that the evidence in this case shows an intention to pay the tax on the date the check was delivered to the Collector, even though the exact amount was not known. See *Estate of Rogers v. Commissioner*, decided May 12, 1942 (1942 P-H B. T. A. Memorandum Decisions, par. 42,275). The tax here was due on or before December 25, 1934, and when the payment was made on December 24, the tax was due and owing although it was impossible to determine the exact amount. The petitioners had requested an extension of time for filing the return and this had been granted by the Commissioner, but his letter of December 15, 1934, granting the extension advised petitioners that the payment of the tax was not postponed by the extension and suggested that payment be made to avoid penalty and interest (R. 6-7). Petitioners accordingly transmitted their check stating that it was sent "as a payment on account of the Federal Estate tax" (R. 7). The statement in the letter of transmittal (R. 7) that the payment was made under duress, and that it "is contended by the executors that not all of this sum is legally or lawfully due" was probably made to satisfy the former requirement that only taxes paid under

⁹ Cf. *American Hide & L. Co. v. United States*, 284 U. S. 343, 347, in which the Court said:

The object of the payment is in each instance defined by the intention of the taxpayer, to be ascertained from all the relevant facts and circumstances.

protest could be subsequently refunded in a lawsuit. Furthermore, it did not indicate that the petitioners were paying more than they estimated that the return would disclose; and in any event the letter could not toll the statutes of limitations. If they had made any such statement, the Collector might have been justified in refusing to accept the check, but here he had no reason to do so.

There is no significance to be attached to the fact that the Collector retained the amount of \$39,775.76 in Account 9 to the credit of the estate until April 1938. This was simply a matter of bookkeeping. Account 9 is an account to which payments are credited if no assessment against the person making such payment is outstanding and all payments placed in this account are deposited by the Collector as internal revenue collections to the credit of the Treasurer of the United States in the same manner as collections applied immediately to some account on the collection list. Petitioners contend (Br. 12-16) that the balance of \$39,775.76 was being retained as a deposit to secure the payment of any additional tax that might be due. However, the Collector treated it not as a deposit but as a payment of tax. When the additional deficiency of \$48,534.84 was determined and assessed and the amount of \$39,775.76 applied against it, no interest was assessed against the petitioners on the latter amount as required by Section 308 (h) of the Revenue Act of 1926, providing that interest

upon the amount determined as a deficiency shall be paid and collected "from the due date of the tax to the date the deficiency is assessed, * * *." Interest was assessed and paid on the remainder of the deficiency. (R. 9.) This failure to demand or pay interest is indicative of the fact that the parties were treating the amount of \$39,775.76 as having been "paid" as a part of the estate tax liability on December 24, 1934, for otherwise petitioners would have owed interest from that date, or at least from December 25, 1934, the due date of the tax.

It is true that under similar circumstances in cases involving the question of the interest allowable "upon any overpayment in respect of any internal revenue tax" within the meaning of Section 3771 of the Internal Revenue Code or similar provisions of earlier statutes, the Government has taken the position that the excess of a payment made in advance of the filing of the return over the tax subsequently determined to be due is not an overpayment, and in those cases it was argued that the excess was a deposit. The decisions in the interest cases, however, have not been uniform, and as we shall subsequently point out, that issue has now been settled by Congress in a manner that is completely consistent with the position taken in this case. In *Busser v. United States*, 130 F. 2d 537 (C. C. A. 3d), and *Moses v. United States*, 28 F. Supp. 817 (S. D. N. Y.), two cases involving estate taxes, it was

held that the taxpayer was not entitled to interest, but in *Atlantic Oil Producing Co. v. United States*, 35 F. Supp. 766 (C. Cls.), interest was allowed. See also Memorandum Opinion of the Tax Court in *Estate of Rogers v. Commissioner*, decided May 12, 1942 (1942 P-H B. T. A. Memorandum Decisions, par. 42,275) which, while not dealing with interest, held that the advance payment was included in the overpayment. It was also allowed in *Chicago Title & Trust Co. v. United States*, 45 F. Supp. 323 (N. D. Ill.), though the latter case involved payment of a tentative deficiency and was distinguished in the *Busser* case on that ground. The theory in the *Busser* case was that the sovereign was not liable for interest in the absence of clear statutory authority (see *Tillson v. United States*, 100 U. S. 43, 47; *United States v. North Carolina*, 136 U. S. 211) and that at the time the check was sent nothing was due and the remittance of the tax was voluntary. On the other hand, the Court of Claims in the *Atlantic Oil Producing* case said that the only requirement was that the payment be made "in respect of any internal revenue tax," that the payment involved was made in respect of the capital stock tax, and when it turned out that the payment was too great, it was an "overpayment" within the meaning of the statute.

The rule of construction that the sovereign is not liable for interest in the absence of clear statutory authority may have justified resolving

the doubt in favor of the Government in the *Busser* and *Moses* cases. Here the statute is one limiting the right to sue the United States, and the applicable rule of construction is that statutes prescribing the conditions under which the United States consents to be sued should receive a strict construction in favor of the United States. *United States v. Sherwood*, 312 U. S. 584, 590; *Rock Island &c. R. R. v. United States*, 254 U. S. 141. Statutes requiring that a claim for refund be filed within a prescribed period have in general been strictly construed¹⁰ and while the Government may waive requirements as to form (*Tucker v. Alexander*, 275 U. S. 228; *United States v. Kales*, 314 U. S. 186), it cannot waive requirements as to time. *United States v. Garbutt Oil Co.*, 302 U. S. 528; *United States v. Andrews*, 302 U. S. 517. If, however, the two statutes should be construed similarly on the theory that both rest in final analysis on the time of payment of the tax, the decisions on the interest questions are quite inconclusive and Congress has apparently solved the interest question for the fu-

¹⁰ For example, it has been held that a tax claim filed after the specified period of years from the date a check in payment of the tax is deposited with the Collector is too late, even though the check was cashed within such period. *Second Nat. Bank v. United States*, 42 F. 2d 344 (C. Cls.); *B. Altman & Co. v. United States*, 40 F. 2d 781 (C. Cls.), certiorari denied, 282 U. S. 863; *Whitehall Lunch Club v. United States*, 9 F. Supp. 132 (C. Cls.). Cf. *Bryan v. United States*, 99 F. 2d 549 (C. C. A. 10th), certiorari denied, 305 U. S. 661.

ture in a manner consistent with the decision in the *Atlantic* case and with our position here.

While no material change in the statute relating to interest has been made (see Section 3771 of the Internal Revenue Code (26 U. S. C. Sec. 3771)), an amendment of Section 3770 of the Internal Revenue Code (26 U. S. C. Sec. 3770) made by Section 4 (d) of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, apparently makes the decision in the *Busser* case inoperative. Section 3770, dealing with the authority of the Commissioner to make abatements, credits and refunds, was amended by adding a new subdivision (c) providing as follows:

(c) *Rule Where No Tax Liability.*—An amount paid as tax shall not be considered not to constitute an overpayment solely by reason of the fact that there was no tax liability in respect of which such amount was paid.

This provision is applicable to all overpayments and not merely to those made as a consequence of the new system of estimating income taxes and paying them in advance under the Current Tax Payment Act of 1943, though the new procedure made the question a more pressing one. The legislative history shows that the provision was designed to distinguish a situation where the tax is paid in advance pursuant to requirements of the law and a situation where money is merely dumped on the Collector with no relevance to

actual requirements. H. Conference Rep. No. 510, 78th Cong., 1st Sess., p. 48 (Appendix, *infra*, pp. 36-37).

It is obvious, for reasons previously indicated (*supra*, pp. 6-7, 26-27, 28, 29-30), that the payment here was made pursuant to requirements of the law and was not merely dumped on the Collector. That being true, under the Current Tax Payment Act, interest would be due on any overpayment from December 24, 1934. If the same principles are to be applied in determining when the tax was paid for the purpose of determining the limitation upon the period for filing refund claims, and the amount of recovery, then all of the tax here except for the sum of \$10,497.34 was paid on December 24, 1934, the claim for refund was filed more than three years thereafter, and no recovery except of \$10,497.34 is allowable.

As we have hitherto pointed out (*supra*, pp. 13-14, 25), the claim was too late even if \$120,000 of the tax were considered to have been paid either when the return was filed or when the original assessment was made in 1935. We think, however, that only December 24, 1934, the date of actual payment of this sum may be regarded as the date of payment of the tax. To hold, as petitioners contend, that the excess payment over the tax disclosed by the return does not become a payment of the tax until applied against a deficiency, leaves the status of the excess undetermined during the

interim. The Commissioner may not happen to assert a deficiency, or if he does, the deficiency may not absorb all of the advance payment that has not already been absorbed by the original assessment. Thus the applicable period of limitations would turn upon uncertainties. Orderly administration of the revenue laws requires that taxpayers know the limitations on filing claims for refund.

CONCLUSION

Since the petitioners' claim for refund was not filed within the statutory period, they are not entitled to recover any of the amount paid on December 24, 1934, and the decision of the court below should be affirmed.

Respectfully submitted..

CHARLES FAHY,

Solicitor General.

SAMUEL O. CLARK, Jr.,

Assistant Attorney General.

SEWALL KEY,

HELEN R. CARLOSS,

ELIZABETH B. DAVIS,

Special Assistants to the Attorney General.

WALTER J. CUMMINGS, Jr.,

Attorney.

DECEMBER 1944.

APPENDIX

H. Conference Rep. No. 510, 78th Cong., 1st sess., reads in part as follows (p. 48):

Section 4 (d) of the Senate bill adds new subsection (c) to section 3770 of the code. Under this provision an amount paid as tax shall not be considered not to constitute an overpayment solely because there was no tax liability in respect of which that amount was paid.

The income-tax law requires the taxpayer to make a return of his tax and to pay the tax so returned. These requirements contemplate that in the discharge of these duties at the time, place, and manner prescribed, honest mistakes will occur—mistakes both as to the amount of the tax and as to the existence of any tax liability; and that such honest mistakes made incident to the bona fide orderly compliance with the actual or reasonably apparent duties of the taxpayer are to be corrected under the provisions of law governing overpayments. It is believed that existing law so provides. The language of certain court decisions (holding that certain payments, not made incident to a bona fide and orderly discharge of actual or reasonably apparent duties imposed by law, are not overpayments and accordingly that interest is not payable) has been read by some as meaning that no payment can result in an overpayment if no tax liability actually existed. It is not believed that such reading is in any

way a statement of existing law. The provisions of the bill, however, emphasize the need for clarity in this regard.

Under the bill as passed by the Senate, two requirements become basic features of the income tax: (1) The declaration and payment of the estimated tax; and (2) the withholding and collection by the employer of tax from the wages of employees, and the return and payment as such of the amount by the employer to the Government. Honest mistakes incident to faithful and orderly compliance will, of course, occur, just as they have in the older procedures of the tax. The doubts expressed as to the existence of an overpayment in case it ultimately turns out that there is no tax, it is believed should be put to rest, and to this end the amendment to section 3770 of the code was inserted in the Senate bill. It is thought that the code does not contemplate that liability for interest can be cast on the Government by merely dumping money as taxes on the collector, by disorderly remittances to him of amounts not computed in pursuance of the actual or reasonably apparent requirements of the code, or not transmitted in accordance with the procedures set up by the code, or by other abuses of tax administration. As to these, a proper application of existing law will enable the courts, in the future as generally in the past, to deny treatment as overpayments to these improper payments.



SUPREME COURT OF THE UNITED STATES.

No. 207.—OCTOBER TERM, 1944.

Lena Rosenman and the National City
Bank of New York, a Corporation,
as Executors of the Last Will and
Testament of Louis Rosenman, De-
ceased, Petitioners,

vs.

The United States.

On Writ of Certiorari to
the Court of Claims.

[January 29, 1945.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

This is an action upon a claim for refund of a federal estate tax, and the specific question before us is whether the claim was asserted too late. The matter is governed by § 319(b) of the Revenue Act of 1926, 44 Stat. 9, 84, as amended by § 810(a) of the Revenue Act of 1932, 47 Stat. 169, 282, 26 U. S. C. § 910, reading as follows:

"All claims for the refunding of the tax imposed by this title alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax. The amount of the refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of the refund."

Petitioners are executors of the will of Louis Rosenman, who died on December 25, 1933. Under appropriate statutory authority, the Commissioner of Internal Revenue extended the time for filing the estate tax return to February 25, 1935. But there was no extension of the time for payment of the tax which became due one year after the decedent's death, on December 25, 1934. The day before, petitioners delivered to the Collector of Internal Revenue a check for \$120,000, the purpose of which was thus defined in a letter of transmittal: "We are delivering to you herewith, by messenger, an Estate check payable to your order, for \$120,000, as a payment on account of the Federal Estate tax. This payment is made under protest and duress, and solely

for the purpose of avoiding penalties and interest, since it is contended by the executors that not all of this sum is legally or lawfully due." This amount was placed by the Collector in a suspense account to the credit of the estate. In the books of the Collector the suspense account concerns moneys received in connection with federal estate taxes and other miscellaneous taxes if, as here, no assessment for taxes is outstanding at the time. On February 25, 1935, petitioners filed their estate tax return according to which there was due from the estate \$80,224.24. On March 28, 1935, the Collector advised petitioners that \$80,224.24 of the \$120,000 to their credit in the suspense account had been applied in satisfaction of the amount of the tax assessed under their return. On the basis of this notice, petitioners, on March 26, 1938, filed a claim for \$39,775.76, the balance between the \$120,000 paid by them under protest and the assessed tax of \$80,224.24.

Upon completion, after nearly three years, of the audit of the return, the Commissioner determined that the total net tax due was \$128,759.08. No appeal to the Board of Tax Appeals having been taken, a deficiency of \$48,534.84 was assessed. The Collector thereupon applied the balance of \$39,775.76 standing to the credit of petitioners in the suspense account in partial satisfaction of this deficiency, and on April 22, 1938, petitioners paid to the Collector the additional amount of \$10,497.34, which covered the remainder of the deficiency plus interest. The Commissioner then rejected the petitioners' claim for refund filed in March of that year. On May 20, 1940, petitioners filed with the Collector a claim, based on additional deductions, for refund of \$24,717.12. The claim was rejected on the ground, so far as now relevant, that the tax claimed to have been illegally exacted had been paid more than three years prior to the filing of the claim, except as to the amount of \$10,497.34 paid by petitioners in 1938. Petitioners brought this suit in the Court of Claims which held that recovery for the amount here in dispute was barred by statute, 53 F. Supp. 722. To resolve an asserted conflict of decisions in the lower courts we brought the case here. 323 U. S. —.

Claims for tax refunds must conform strictly to the requirements of Congress. A claim for refund of an estate tax "alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the

payment of such tax." On the face of it, this requirement is couched in ordinary English, and since no extraneous relevant aids to construction have been called to our attention, Congress has evidently meant what these words ordinarily convey. The claim is for refund of a tax "alleged to have been erroneously or illegally assessed or collected", and the claim must have been filed "after the payment of such tax", that is, within three years after payment of a tax which according to the claim was erroneously or illegally collected. The crux of the matter is the alleged illegal assessment or collection, and "payment of such tax" plainly presupposes challenged action by the taxing officials.

The action here complained of was the assessment of a deficiency by the Commissioner in April 1938. Before that time there were no taxes "erroneously or illegally assessed or collected" for the collection of which petitioners could have filed a claim for refund. The amount then demanded as a deficiency by the Commissioner was, so the petitioners claimed, erroneously assessed. It is this erroneous assessment that gave rise to a claim for refund. Not until then was there such a claim as could start the time running for presenting the claim. In any responsible sense payment was then made by the application of the balance credited to the petitioners in the suspense account and by the additional payment of \$10,497.34 on April 22, 1938. Both these events occurred within three years of May 20, 1940, when the petitioners' present claim was filed.

But the Government contends "payment of such tax" was made on December 24, 1934, when petitioners transferred to the Collector a check for \$120,000. This stopped the running of penalties and interest, says the Government, and therefore is to be treated as a payment by the parties. But on December 24, 1934, the taxpayer did not discharge what he deemed a liability nor pay one that was asserted. There was merely an interim arrangement to cover whatever contingencies the future might define. The tax obligation did not become defined until April 1938. And this is the practical construction which the Government has placed upon such arrangements. The Government does not consider such advances of estimated taxes as tax payments. They are, as it were, payments in escrow. They are set aside, as we have noted, in special suspense accounts established for depositing money received when no assessment is then outstanding against the tax-

payer. The receipt by the Government of moneys under such an arrangement carries no more significance than would the giving of a surety bond. Money in these accounts is held not as taxes duly collected are held but as a deposit made in the nature of a cash bond for the payment of taxes thereafter found to be due. See Ruling of the Comptroller General, A-48307, April 14, 1933, 1 (1935) Prentice-Hall Tax Service, Special Reports, paragraph 45. Accordingly, where taxpayers have sued for interest on the "overpayment" of moneys received under similar conditions, the Government has insisted that the arrangement was merely a "deposit" and not a "payment" interest on which is due from the Government if there is an excess beyond the amount of the tax eventually assessed. See *Busser v. United States*, 130 F. 2d 537, 538; *Atlantic Oil Producing Co. v. United States*, 35 F. Supp. 766; *Moses v. United States*, 28 F. Supp. 817; *Chicago Title & Trust Co. v. United States*, 45 F. Supp. 323; *Estate of Rogers v. Commissioner*, 1942 Prentice-Hall B. T. A. Memorandum Decisions, paragraph 42,275. If it is not payment in order to relieve the Government from paying interest, it cannot be payment to bar suit by the taxpayer for its illegal retention. It will not do to treat the same transaction as payment and not as payment, whichever favors the Government. See *United States v. Wurts*, 303 U. S. 414.

Exaction of interest from the Government requires statutory authority, and it merely carries out the true nature of an arrangement such as this to treat it as an estimated deposit and not as a payment which, if in excess of what should properly have been exacted, entitled the taxpayer to interest as the return on the use that the Government has had of moneys that should not have been exacted. (We need not here consider the effect of the Current Tax Payment Act of 1943, § 4(d), 57 Stat. 126, 140.) On the other hand, by allowing such a deposit arrangement, the Government safeguards collection of the assessment of whatever amount tax officials may eventually find owing from a taxpayer, while the taxpayer in turn is saved the danger of penalties on an assessment made, as in this case, years after a fairly estimated return has been filed. The construction which in our view the statute compels safeguards the interests of the Government, interprets a business transaction according to its tenor, and avoids gratuitous resentment in the relations between Treasury and taxpayer.

Reversed.

